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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SHEILA L. BUTTS,

Plaintiff and Appellant,

v.

BOARD OF TRUSTEES OF
THE CALIFORNIA STATE
UNIVERSITY,

Defendant and Appellant.

B282452

(Los Angeles County
Super. Ct. No. TC022325)

APPEAL from orders of the Superior Court of Los Angeles
County, Brian S. Currey, Judge. Affirmed as modified.

Paul Kujawsky for Plaintiff and Appellant.

Lynberg & Watkins, Ric C. Ottaiano and Ruben
Escobedo III, for Defendant and Appellant.

* * * * *

This is the second time this case is before us. Plaintiff Sheila L. Butts was a longtime employee of California State University (CSU) at Dominguez Hills, who, over the course of her employment, achieved permanent status in a nonmanagerial position. She was later promoted to an at-will management position, which did not carry permanent status. She was ultimately terminated from her management position, and was not permitted to “retreat” to a permanent status position, as provided for in California Code of Regulations, title 5, section 42723 (hereafter section 42723). (See *Butts v. Board of Trustees of California State University* (2014) 225 Cal.App.4th 825, 828-830 (*Butts I*).

In 2008, plaintiff sued defendant Board of Trustees of the State of California University, making claims of discrimination and retaliation based on her termination under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.). She also asserted defendant violated her right to “retreat” into a formerly held permanent position. After the trial court found on summary adjudication that plaintiff did not qualify for retreat rights as a matter of law, the case proceeded to trial on only her retaliation claim (plaintiff abandoned the discrimination claims), and the jury returned a verdict in defendant’s favor. (*Butts I, supra*, 225 Cal.App.4th at pp. 830-832.)

Plaintiff appealed, and we found the trial court erred in concluding plaintiff was not entitled to retreat rights under the terms of section 42723. We affirmed the judgment regarding plaintiff’s retaliation claim, and remanded with directions that plaintiff be permitted to pursue her claim for retreat rights. (*Butts I, supra*, 225 Cal.App.4th at p. 845.)

Following remand, plaintiff attempted to reassert her discrimination claims as well as her claim for retreat rights. The trial court dismissed plaintiff's discrimination claims, finding they were outside the scope of our remand. Following a bench trial on her retreat rights claim, the court found that plaintiff had waived her right to reinstatement into a formerly held permanent position. The court entered judgment for defendant, and awarded defendant its costs.

On appeal, plaintiff contends that her discrimination claims were erroneously dismissed; the court's finding of waiver was not supported by substantial evidence; she is entitled to attorney fees for prevailing in her earlier appeal, based on the private attorney general statute, Code of Civil Procedure section 1021.5; and the court erred in denying her motion to tax costs. We agree that plaintiff's FEHA-related costs should have been taxed, and modify the judgment accordingly. We otherwise affirm the judgment below.¹

BACKGROUND

1. Proceedings Leading to First Appeal

The procedural history of the case that led to the first appeal is largely taken from our opinion in *Butts I* as follows:

The operative complaint at the time of trial was the second amended complaint which alleged three causes of action for discrimination on the basis of race, gender, and age and a fourth cause of action for retaliation. Plaintiff alleged as facts common

¹ Defendant also filed a "protective" cross-appeal, arguing the merits of its other affirmative defenses to plaintiff's petition for writ of mandate. Given the basis for our decision, we need not reach the merits of defendant's cross-appeal.

to all causes of action that defendant wrongly denied her retreat rights. (*Butts I, supra*, 225 Cal.App.4th at pp. 830-831.)

Apparently concerned that plaintiff would attempt to prove discrimination and/or retaliation by showing that she was denied her retreat rights, defendant brought a motion for summary adjudication which asserted that defendant had no duty to provide plaintiff with retreat rights after she was terminated from her management position. The primary basis of defendant's motion for summary adjudication dealt with section 42723. That regulation addresses the permanent status of management personnel and the availability of retreat rights under circumstances of their termination. (*Butts I, supra*, 225 Cal.App.4th at p. 831.)

According to defendant, section 42723 had a very limited application: It applied only to employees who were already in management on January 1, 1984, at the time a new Management Personnel Plan (MPP) went into effect. Since plaintiff was not promoted to a management position until 2003, defendant argued that section 42723 did not apply to her and, therefore, it had no duty to let her retreat to her previous bargaining unit position. (*Butts I, supra*, 225 Cal.App.4th at p. 831.)

Plaintiff opposed the motion for summary adjudication on the ground that section 42723 did apply to her. The motion for summary adjudication was granted. The case proceeded to trial. Before it commenced, plaintiff's discrimination claims were dropped, leaving only the retaliation claim for jury

consideration.² Just prior to trial, defendant brought motions in limine seeking to exclude evidence of defendant's refusal to provide plaintiff with retreat rights, based upon its contention that section 42723 did not apply to plaintiff, which was already determined as a matter of law by the motion for summary adjudication. The trial court granted the motion in limine. (*Butts I, supra*, 225 Cal.App.4th at pp. 831-832.)

After a four-week trial, the jury found that defendant had not retaliated against plaintiff when it terminated her after she complained about discrimination. Judgment for the defendant was entered based upon that verdict from which plaintiff filed her first appeal. (*Butts I, supra*, 225 Cal.App.4th at p. 832.)

2. *Butts I*

The scope of plaintiff's first appeal was very narrow. As we noted in our opinion, "[p]laintiff concedes that she is not attacking either the verdict or the resolution of factual issues. It follows that even if there were errors in the pretrial proceedings, plaintiff agrees they were harmless as to the jury's verdict on the issue of retaliation. Therefore, to the extent the final judgment was based upon the finding of no retaliation, plaintiff accepts it. No reversal is requested, and none is warranted. [¶] Instead, plaintiff is seeking reversal of the judgment to the extent it denied her the right to retreat from her management position to

² Over the course of the four-week trial, plaintiff did not "put on any evidence" in support of her discrimination claims. Instead, the focus of the trial was that plaintiff was retaliated against for "making complaints of discrimination." On the last day of trial, plaintiff's counsel clarified that "[w]e are no longer making or pursuing a cause of action for discrimination on race, age, or gender." Therefore, those claims were not submitted to the jury.

her former bargaining unit position—regardless of whether the denial was due to retaliation on defendant’s part.” (*Butts I, supra*, 225 Cal.App.4th at p. 832.) We noted that plaintiff’s discrimination claims had been “dropped” at trial, and that the appeal did not present any claims of error or prejudice in support of these causes of action. (*Id.* at p. 831.)

Interpreting the language of section 42723, and its history and development, we concluded that the retreat right provided for in section 42723 plainly applied to plaintiff. We concluded that “[d]efendant had an obligation to provide retreat rights to [plaintiff] when she was terminated from her [management] position.” (*Butts I, supra*, 225 Cal.App.4th at p. 842.)

In accordance with this finding, our disposition stated: “The judgment in favor of defendant entered on July 10, 2012, reflects the jury’s finding on plaintiff’s claim for retaliation, and to that extent it is affirmed. However, to the extent the judgment reflects a finding against plaintiff on her claim for retreat rights without providing her an opportunity to have it heard on the merits, it is reversed and remanded for further proceedings consistent with this opinion.” (*Butts I, supra*, 225 Cal.App.4th at p. 845.) Neither party sought rehearing, and remittitur issued on June 25, 2014.

3. Proceedings Following Remand

This case took many procedural twists and turns following remand, with the central issue being the scope of this court’s remand, which claims plaintiff should be allowed to pursue, and what form those claims should take.

Plaintiff was permitted to file a fourth amended complaint, reasserting her abandoned causes of action for discrimination, and seeking damages for violation of her retreat rights under

section 42723. Initially, the court was persuaded we had issued an “open remand” and that plaintiff should be allowed to “seek leave to amend as if the appeal had never occurred.”

Later, the court granted judgment on the pleadings regarding plaintiff’s claim for damages under section 42723, finding there was no action for damages under this section. The court granted plaintiff leave to file a fifth amended complaint, allowing plaintiff to seek enforcement of her right to reinstatement under section 42723 by writ of mandate, rather than an action for damages.

With her fifth amended complaint, plaintiff commenced a mandamus proceeding under Code of Civil Procedure section 1085, seeking a peremptory writ of mandate ordering defendant to reinstate her and pay backpay retroactive to the date of the termination of her employment. The pleading also included plaintiff’s claims for discrimination.

The trial court later granted defendant’s motion for summary adjudication of the discrimination claims, finding that the case was remanded for the very limited purpose of determining plaintiff’s retreat rights, and not plaintiff’s discrimination claims.

4. Trial on Writ Petition

On January 27, 2017, the trial court held a bench trial on plaintiff’s only remaining claim, her petition for writ of mandate seeking reinstatement of her employment.

Among the exhibits admitted into evidence at the trial was defendant’s August 13, 2015 letter, offering to reinstate plaintiff to a permanent position. The letter stated in part, “In keeping with its obligations under Section 42723, CSU hereby offers to employ Ms. Butts in the former class in which permanent status

was held by Ms. Butts (Class 3084, SSP III) at the salary last received in the permanent class, as if Ms. Butts had been employed in her SSP III position continually between September 9, 2003 (when Ms. Butts resigned from her SSP III position) through the date on which Ms. Butts resumes her employment with CSU.” The letter also included a guide to CalPERS Reinstatement from Retirement, as Government Code section 21220 prevents employment of retired personnel. The letter advised plaintiff to immediately contact defense counsel “to discuss this matter.”

By letter dated August 18, 2015, plaintiff rejected the offer. In the opening paragraph, plaintiff asserted “Your August 13, 2015 correspondence indicates that [defendant] is fulfilling its legal obligation to [plaintiff] by offering to employ her in a position in the former class in which she had attained permanent status. This offer is, to say the least, unacceptable.” Plaintiff explained that the timing of the offer indicated that it was in bad faith, and motivated only by defendant’s desire to “avoid liability.”

Plaintiff went on to argue that “[a]n award of front pay is made in lieu of reinstatement when the antagonism between employer and employee is so great that reinstatement is not appropriate. [Citation.] The parties have been involved in litigation since the complaint was filed in December 2008. During the June 2012 trial, CSU took positions that were adverse to Ms. Butts. This has been emotionally devastating to Ms. Butts. Returning to this environment would place her in the untenable position where she is reminded on a daily basis of the wrongs that were done to her. [¶] On June 24, 2008, a little over two months after a EEOC mediation, Ms. Butts was given a

performance evaluation for 2007-2008. The evaluation had a rating of ‘marginal.’ . . . It is unlikely that a marginal evaluation in her Management Personnel Plan position will be viewed favorably when she performs her job, and certainly closes avenues to advancement. Ms. Butts’ reputation has been irreparably damaged within the CSU community and with alumni. [¶] The abysmal manner in which Ms. Butts has been treated cannot be wiped away by a bad faith offer to reinstate her to a lower level position. [¶] These are just a few of the reasons that this offer is unacceptable. We are certainly open to discuss making Ms. Butts whole.”

By declaration, plaintiff testified it was “unclear” from defendant’s letter whether defendant was offering her back pay, and that it was “somewhat odd that the letter did not mention at what campus [she] would be placed.” She was concerned that defendant might attempt to place her under the supervision of her former supervisors. She authorized her attorney to reply to defendant’s offer, but heard nothing further from defendant following her letter. She never intended to waive her right to retreat to a permanent position.

In another declaration, plaintiff testified that it was unclear from defendant’s offer what position or salary she would be restored to. The SSP III position includes a broad category of positions. Moreover, CSU job offers generally include the position title and description, the department in which the position has been placed, the office or workplace location, and the starting salary. Defendant’s offer did not include any of this information. Therefore, plaintiff was concerned that the offer was not a “legitimate good-faith job offer.” In fact, following her

first appeal, defendant did not discuss reinstatement with plaintiff until the August 2015 offer was made.

In plaintiff's response to defendant's special interrogatories, plaintiff indicated that she refused defendant's offer because it was not made in good faith. She did not identify any ambiguity in the offer, or any failure of the offer to address back pay as a reason for her refusal.

A declaration from defense counsel stated that the offer of employment was made in good faith, and was "intended to . . . comply with all incidental duties, such as the provision of additional vacation accrual and back pay as provided by law. [Plaintiff] did not inquire in any manner regarding any perceived ambiguity created by the offer."

The trial court found plaintiff's letter plainly indicated that "reinstatement is not going to work," and that it seemed clear that plaintiff was only interested in damages rather than reinstatement. The court found plaintiff's declarations, indicating that she did not intend to waive her retreat rights, to not be persuasive or credible in light of the letter.

In its statement of decision, the trial court found that plaintiff had waived her right to reinstatement, and therefore writ relief was improper. The court found plaintiff's testimony was not credible, and the true reason plaintiff rejected the offer was not any ambiguity in the offer, but that she no longer wanted to work for defendant.

Judgment was entered for defendant. The trial court denied plaintiff's subsequent motion for a new trial.

5. Motion to Tax Costs

On December 15, 2009, defendant made a Code of Civil Procedure section 998 offer to settle the case for \$35,001. Plaintiff rejected that offer.

On March 21, 2017, defendant filed a memorandum of costs, seeking \$66,931.79 in costs, including filing and motion fees, jury fees, deposition costs, costs for service of process, witness fees, court reporter fees, \$35,469.81 in expert witness and mediation fees, and \$2,100 in attorney fees.

Plaintiff moved to tax costs, arguing that costs in a FEHA action may only be recovered if the action was without merit. Alternatively, plaintiff argued that only costs related to her non-FEHA claims could be recovered. Plaintiff did not challenge the claimed \$2,100 in attorney fees.

In opposition, defendant argued that it could recover all of its postoffer costs, even for plaintiff's FEHA claims. Defendant confirmed that it was not arguing that plaintiff's FEHA claims were meritless or brought in bad faith. Defendant also argued that it was entitled to recover costs on plaintiff's retreat rights claim, as this claim was not brought under FEHA.

The trial court found that defendant was not entitled to \$2,867.98 "in FEHA-related pre-§ 998 offer costs" but found that the remainder of the claimed costs were recoverable. Specifically, the court found that "\$21,651.22 in post-§ 998 offer FEHA-based" costs were recoverable. The court also found that \$16,625 in postoffer expert witness fees were recoverable. Regarding the remainder of the fees, the court found they were appropriately apportioned to the defense of plaintiff's retreat right claims. The court awarded defendant costs of \$64,063.81.

ANALYSIS

1. Dismissal of Discrimination Claims

Plaintiff contends the trial court erred in dismissing her discrimination claims, reasoning that this court affirmed only the judgment on her retaliation claim, and that all other claims were open for retrial following remand. Plaintiff argues she was unable to pursue her discrimination claims in the first trial because of the erroneous ruling on defendant's motion for summary adjudication regarding her retreat rights, and that the issues of discrimination and retreat rights were intertwined. We are not persuaded.

The power of the trial court following remand is as follows: "An unqualified reversal of a judgment on appeal vacates the trial court judgment and permits a retrial of all issues. Retrial of those issues is, however, limited by the law of the case established on the intervening appeal. "The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial ' . . . [¶] . . . [¶] In the situation of an unqualified reversal, the trial court has discretion to interpret the appellate opinion to determine its impact upon the law of the case."

(*Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 146-147 (*Puritan Leasing*), citations omitted.)

"Where in contrast to a general reversal the decision on appeal reverses with directions, the trial court is 'reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void.' . . . The

exceptions which limit the doctrine of law of the case do not apply. [¶] The strict rule applies although the directions of the reviewing court are based upon an erroneous concept. The remedy of the party aggrieved by the error lies only in a petition to a reviewing court.” (*Puritan Leasing, supra*, 76 Cal.App.3d at p. 147, citations omitted.)

“Whether the trial court has correctly interpreted an appellate opinion is an issue of law subject to de novo review. In interpreting the language of a judicial opinion, the appellate court looks to the wording of the dispositional language, construing these directions ‘in conjunction with the opinion as a whole.’” (*Ducoin Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 313.)

Here, *Butts I* expressly found that plaintiff had abandoned her discrimination claims, and that they were not at issue in the appeal. We did not find any prejudicial error caused plaintiff to abandon her discrimination claims. We affirmed the verdict on the retaliation claim that defendant had not retaliated against plaintiff when it terminated her after she complained about discrimination. We determined that plaintiff was entitled to have her *retreat rights* tried on the merits. (*Butts I, supra*, 225 Cal.App.4th at p. 843.) We did not direct the court on remand to permit plaintiff to revive her abandoned discrimination claims. The trial court correctly interpreted our opinion, and dismissal of the discrimination claims asserted after our remand was proper.

2. Waiver of Right to Reinstatement

Plaintiff contends the trial court's conclusion that she waived her right to reinstatement is not supported by substantial evidence.

“On appeal, we apply the substantial evidence standard of review to a trial court's factual findings in granting or denying a writ of mandate, while independently reviewing its conclusions on legal issues” (*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115, 123.) “‘[T]he power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.” (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

“ ‘ “In general, to constitute a waiver, there must be an existing right, a knowledge of its existence, an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished.” ’ ” (*DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265.)

Here, the trial court found plaintiff had waived her right to reinstatement, after she made clear that she had no intention of returning to work for defendant. We find substantial evidence supports this conclusion. Plaintiff's letter and discovery responses made clear that returning to work would be impossible for her, and made no mention of any ambiguities in the offer, or any desire to further explore the possibility of reinstatement.

Substantial evidence supports the trial court's finding that plaintiff wanted damages, not reinstatement.

Plaintiff contends that her interest in damages was a reasonable alternative to reinstatement, and therefore cannot be considered a waiver of her right to reinstatement. However, plaintiff tried a claim for a writ of mandamus, not a claim for damages. She does not argue on appeal that she should have been able to maintain an action for damages under section 42723. (*Tevis v. San Francisco* (1954) 43 Cal.2d 190, 198.) Because she declined defendant's offer of the only relief available to her in this case, the court's finding of waiver is supported by substantial evidence.

**3. Attorney Fees Under Code of Civil Procedure
Section 1021.5**

Even though plaintiff never made a motion for attorney fees in the trial court, plaintiff asks that we instruct the trial court to award plaintiff attorney fees under Code of Civil Procedure section 1021.5,³ for her successful prosecution of her first appeal. Because plaintiff never requested this relief in the trial court, we decline to order it on appeal. If she wanted to preserve her claim to such fees, she should have sought them in the years intervening our remand and entry of judgment in this case. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.)

³ Code of Civil Procedure section 1021.5 provides that “[u]pon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest”

4. Motion to Tax Costs

Plaintiff contends the court erroneously denied her motion to tax costs.

Generally, the prevailing party in “any action or proceeding” is entitled to costs as a matter of right. (Code Civ. Proc., § 1032, subd. (b).) A defendant against whom a plaintiff recovers no relief is a “prevailing party.” (*Id.*, subd. (a)(4).) An exception to this rule is for FEHA actions. An award of costs to the prevailing party in a FEHA action is within a trial court’s discretion, and plaintiffs and defendants do not have the same entitlement to costs. (Gov. Code, § 12965, subd. (b); *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 108.) A prevailing FEHA plaintiff “should ordinarily receive his or her costs and attorney fees unless special circumstances would render such an award unjust. [Citation.] A prevailing *defendant*, however, should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.” (*Williams*, at p. 115 [addressing ordinary costs]; see also *Baker v. Mulholland Security & Patrol, Inc.* (2012) 204 Cal.App.4th 776, 783 [addressing expert fees]; *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985 [addressing attorney fees].)

Code of Civil Procedure section 998 provides another basis for allocating costs. It provides that “[i]f an offer [for settlement] made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the offer.” (*Id.*, subd. (c)(1).) There is

currently a split of authority regarding whether section 998 applies to nonfrivolous FEHA actions.⁴

In awarding defendant its costs and expert fees, the trial court relied upon *Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, which held that a trial court has discretion to award the prevailing employer in a FEHA case expert witness fees under Code of Civil Procedure section 998 without first establishing the plaintiff's case was frivolous. (*Holman*, at p. 281.)

In contrast, *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525 and *Huerta v. Kava Holdings, Inc.* (2018) 29 Cal.App.5th 74, 84 held that Code of Civil Procedure section 998 does not apply in nonfrivolous FEHA actions. We find these cases more persuasive, and find that the trial court abused its discretion when it awarded defendant its postoffer FEHA costs and expert witness fees of \$38,276.22. (*Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal.App.4th 762, 765-766.)

Regarding the remainder of the fees, the court indicated that those fees could appropriately be apportioned to the

⁴ Effective January 1, 2019, Government Code section 12965, subdivision (b) has been amended to add the following italicized language: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, *except that, notwithstanding Section 998 of the Code of Civil Procedure a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.*"

prosecution of plaintiff's retreat right claims, and not plaintiff's FEHA claims. On appeal, plaintiff does not take serious issue with this finding, except to claim that defendant's section 998 settlement offer was unreasonable. However, "[w]here, as here, the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998." (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 117.)

Plaintiff also argues, without analysis, that her retreat right claims and FEHA claims were "inseparable," and therefore costs should be disallowed on this basis.

Plaintiff has failed to demonstrate that the court abused its discretion in allocating the remaining claimed costs to her retreat right claims.

DISPOSITION

The judgment is affirmed as modified. To the extent the judgment awarded defendant costs of \$64,063.81, the judgment is modified to reflect recoverable costs of \$25,787.59. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.